APPEAL NO. 93390

At a contested case hearing held in (city), Texas, on March 29, 1993, the hearing officer, (hearing officer), concluded that while the appellant (claimant) did give timely notice of an alleged work-related injury to his employer, he did not sustain an illness or occupational disease which arose out of and in the course and scope of his employment nor did he have disability under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act). Claimant's request for review essentially states his disagreement with the two adverse determinations and reargues the evidence. The respondent (carrier) did not file a response.

DECISION

Finding the evidence sufficient to support the hearing officer's factual findings and legal conclusions, we affirm.

Claimant testified he had been employed as a bellman by the Hotel for about two years when, on (date of injury), his feet became very irritated with itching and swelling. He thought he had athlete's feet because his duties entailed much standing and walking, as well as walking down steep steps and across a wet kitchen floor to obtain apples from a refrigerator and walking back up the steps carrying 40 pounds of apples to be given to the hotel guests. Two days later, when working as scheduled, his feet were still irritated, itching, and slightly swollen. He continued to work his scheduled shifts but on October 19th left work early to seek medical treatment at his health maintenance organization (HMO). He was seen by (Dr. T) that evening, given a medication, and told to soak his feet and return the next day. The next morning claimant was seen by (Dr. B) who noted a history of the onset of painful feet six to seven weeks earlier and getting worse, swelling and inflammation, and pain when standing and walking. Dr. B diagnosed "plantar fasciitis/strain foot," prescribed treatment including medication, elevation, warm soaks, and use of a heating pad, and took claimant off work until October 26th. Claimant returned to work on October 26th and also worked on October 27th but left early on October 28th because of his painful feet.

Claimant returned to the HMO on October 29th where he was again seen and taken off work for an indefinite period of time. At that time Dr. B's assessment was foot pain and paresthesia of "unknown etiology." Claimant acknowledged that he could not find a statement in his HMO medical records to the effect that his foot condition was work related. However, he explained that when he initially sought treatment he thought he had athlete's feet until Dr. B advised him otherwise, and he maintained that Dr. B told him his foot condition was work related due to the standing and walking involved although he also said the question was not put "directly." Claimant's most essential point argued at the hearing and on appeal was that he proved that his foot condition was work related, i.e. attributable to his prolonged standing and walking, because he testified he was told so by Dr. B, as well as by a specialist he later saw, (Dr. M). With regard to Dr. M's report, however, claimant said that what Dr. M told him differs from the content of his report.

On the evening of October 29th, claimant was involved in an auto accident and said he received internal injuries from the waist up as well as a back injury but that his foot condition was unaffected. Claimant has not returned to work since October 29th. He stated that he was released to return to work in January 1993 insofar as his auto accident injuries were concerned. He also said he had a lawsuit pending over that accident but did not know whether he was seeking to recover damages for lost wages. He stated he has yet to be "released" to return to work because of his foot condition and that he is "limited because of my feet." He applied for and began to receive unemployment benefits in February 1993 and said he represented to the agency involved with those benefits that he was able to and was looking for work. Claimant, who was 25 years of age and pursuing a bachelors degree, said his employment at the hotel was terminated at that time and that he was looking for work in the travel industry or in case work.

According to his HMO records, claimant called about his motor vehicle accident on November 2, 1992, and was seen on November 4th and 9th. On the latter date, claimant was limping, favoring his left leg, and complaining of pain in the left sciatic notch area. Dr. T's record of February 9, 1993, noted claimant's complaint of swelling feet and that his work involved a lot of standing, walking and carrying which worsened his condition. However, Dr. T's examination revealed no swelling, discoloration or deformity, normal gait and range of motion. Dr. T's assessment was feet swelling of unknown etiology and he referred claimant to a podiatrist. The HMO records also state that claimant's x-rays were negative. According to another HMO record of February 9th, claimant demanded a follow-up visit with Dr. B "regarding foot injury and Workman's Comp," had copies of all his charts with him, and stated that "Dr. can't read." Dr. B's record states that claimant was doing fairly well until his motor vehicle accident on October 29th. Dr. B also found claimant's feet without swelling or redness, though he apparently did note some hypertrophy. His assessment was a history of swelling of feet and he too referred claimant to a podiatrist.

Claimant saw Dr. M on February 12, 1993. The record of that visit indicated that claimant denied any history of trauma to his feet when the swelling and pain began in October 1992. He advised Dr. M that his feet symptoms increased following the motor vehicle accident but thereafter improved, that his last swelling incident occurred on January 24, 1993, and that by February 12th his symptoms were minimal, intermittent, and localized to the plantar aspect of his left foot. Claimant acknowledged the accuracy of the history in Dr. M's report. Dr. M's diagnostic impressions were stated as follows:

1.Probable low-grade plantar fasciitis bilateral secondary to pes planus deformity bilateral.

2.Swelling of undetermined etiology, feet bilateral, possibly secondary to plantar fasciitis which is resolved, right foot, and essentially resolved, left foot.

Dr. M advised claimant that if he returned to a job which required prolonged standing and walking, such as a bellman, he would probably benefit from functional thermoplastic foot orthoses. Claimant said his feet are still being treated, mentioning diet, rest, and possibly orthotics.

At the hearing claimant urged that his standing, walking and climbing stairs at his job for some two years caused his foot condition while the carrier argued it was an ordinary disease of life and observed that Dr. B regarded the swelling of claimant's feet to be of unknown origin while Dr. M felt his plantar fasciitis to be secondary to his pes planus (flat feet) and his swelling to be of unknown origin, possibly secondary to pes planus. Regarding the issue of injury in the course and scope of his employment, the hearing officer found that while claimant was diagnosed on October 20, 1992, with a foot condition described as plantar fasciitis, he did not contract that foot disease while performing work in furtherance of the interest of his employer and concluded, accordingly, that claimant did not sustain an illness or occupational disease which arose out of and in the course and scope of his employment. The hearing officer's discussion indicated a concern with the lack of medical evidence establishing a causal connection between claimant's foot condition and his work.

In Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992, we considered the appeal of an employee from a decision which determined that the employee failed to show her bunions and corns arose from her employment. We there observed that the 1989 Act defines "injury" to include "occupational diseases" which include "repetitive trauma injuries" which are defined as "damage or harm to the physical structure of the body occurring as a the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." We further observed that an occupational disease does not include an ordinary disease of life to which the general public is exposed outside of employment unless such disease is incident to a compensable injury or occupational disease. After noting that the claimant bears the burden to prove the injury was received in the course and scope of employment, we stated that "[t]o recover for a repetitive trauma injury, one must not only prove that repetitious physical traumatic activities occurred on the job, but also prove that a causal link existed between the activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. (Citation omitted.)"

As in Appeal No. 92220, we feel in this case that expert medical evidence is required to show that claimant's work activities caused or aggravated his foot condition because we do not regard his condition (plantar fasciitis) as being within the general experience and common sense of persons generally so that the fact finder can understand a causal connection between his foot condition and his employment based on common knowledge. Claimant testified that both Drs. B and M told him that his work caused his foot problems. The medical records, however, indicated that Dr. B diagnosed the plantar fasciitis and regarded it to be of unknown origin while Dr. M felt it was secondary to pes planus deformity

which was not connected up to claimant's employment and his foot swelling to be of unknown origin but possibly due to the plantar fasciitis. With the evidence in this posture, we cannot say here, as we also could not in Appeal No. 92220, that the hearing officer's findings and conclusions on this issue were against the great weight and preponderance of the evidence. *Compare* Texas Workers' Compensation Commission Appeal No. 92448, decided October 8, 1992, where we affirmed the hearing officer's determination that the employee's acute plantar fasciitis sprain was shown to be compensable.

Since the hearing officer determined, correctly we believe, that claimant failed to prove he was injured in the course and scope of his employment, he could not, therefore, have disability as that term is defined in Article 8308-1.03(16) since his inability to obtain or retain employment at his preinjury wage was not "because of a compensable injury." A finding of a compensable injury is a threshold issue and a prerequisite to the consideration of the issue of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Panel Judge